United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7588

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 76-7588

GAYLE MCQUOID HOLLEY, individually and on behalf of JAMES MCQUOID, NORMAN MCQUOID, THOMAS MCQUOID, DOUGLAS MCQUOID, MICHAEL MCQUOID, and ADELAINE MCQUOID, her minor children,

Plaintiffs-Appellants,

-vs-

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Defendants-Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE LAVINE, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee State
Commissioner of Social Services
The Capitol
Albany, New York 12224
Telephone: (518) 474-7178

JEAN M. COON
Assistant Solicitor General

ALAN W. EBENSTEIN
Principal Attorney

of Counsel

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE LAVINE, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES

Questions Involved

1. Is plaintiff Holley an alien who is "permanently residing in the United States under color of law" within the provisions of 45 C.F.R. § 233.50? The Court below held that she was not.

This question is addressed to plaintiffs' second cause of action which is grounded upon an alleged conflict between

New York Social Services Law § 131-k, as enacted and applied, and the Federal regulation.

2. Are the provisions of section 131-k, as enacted and applied, inconsistent with the Social Security Act (first cause of action)? The Court below held that there was no inconsistency.

3. Having found New York Social Services Law § 131-k to be valid, should not the Court below have requested the convening of a three-judge District Court to hear and determine plaintiffs' constitutional claims? The Court below denied such relief.

The Court below granted summary judgment against the plaintiff and in favor of the State Commissioner.

Statement of the Case

In this action plaintiff Holley, an alien who has been found by the United States Department of Justice, Immigration and Naturalization Service, to be "illegally in the United States" (13)* seeks to obtain a grant of public assistance in the category of Aid to Families with Dependent Children. Her six minor citizen children, on behalf of whom she also sues, presently receive AFDC. The State Commissioner of Social Services, by Decision After an Administrative Fair Hearing, affirmed the action of the County Commissioner in removing plaintiff

* All references are to the Appendix unless otherwise indicated.

Holley from the family budget on the ground that she is an alien who is unlawfully residing in the United States and is not eligible for public assistance (New York Social Services Law, § 131-k)(15-16).

The Immigration and Naturalization Service has stated that plaintiff Holley "is illegally in the United States" and that "this service does not contemplate enforcing her departure from the United States at this time. Should the dependency of the children change, her case would be reviewed for possible action consistent with the circumtances then existing" (Exhibit A, annexed to the Complaint [13]).

The action was commenced in April, 1975 and the State and County Commissioners interposed motions to dismiss.

On July 30, 1975, District Judge BURKE ordered that the action be dismissed for lack of jurisdiction over the subject matter and for failure to state a claim on which relief may be granted. Judgment thereon was entered in the office of the Clerk of the United States District Court for the Western District of New York on July 31, 1975.

Judge BURKE held that "[t]he complaint asserts no substantial claim of unconstitutionality."

This Court decided in favor of substantiality and reversed (529 F. 2d 1294).

On June 24, 1976, the Supreme Court of the United States denied a writ of certiorari as requested by Philip L. Toia, successor to Abe Lavine as State Commissioner of Social Services (44 U.S.L.W. 3737).

In reversing, this Court indicated that the District Judge, sitting alone, may wish to rule upon the pendent claims before convening a three-judge Court to rule upon the constitutional claim. The Court below did so.*

Plaintiffs moved for summary judgment as to the pendent claims (first and second causes of action) as well as to their fourth cause of action (alleged deprivation of rights under Constitution and laws of the United States)(34). In the alternative, they requested an order convening a three-judge District Court as to their third cause of action (constitutional claim).

Defendant State Commissioner cross-moved for summary judgment as to the entire complaint (38). However, in the Court below we addressed ourselves only to the pendent claims

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* Since the Court below ruled against the pendent claims, it would seem that a three-judge Court should have been requested to hear and determine plaintiffs' constitutional claims. (Hagans v. Lavine [415 U.S. 528, 544 (1974)], but see Friedman v. Berger [___F. 2d___ (2d Cir., December 8, 1976) slip op., p. 836, note 6].) The repeal of 28 U.S.C. §§ 2281 and 2282 by Public Law 94-381 (90 Stat. 1119), approved August 12, 1976, does not "* * * apply to any action commenced on or before the date of enactment" (id. Sec. 7).

and to plaintiffs' fourth cause of action, insofar as it relates to the pendent claims.* The constitutional claim was left for the three-judge Court if convened.**

The Complaint (3)

The complaint alleges that plaintiff Holley is a citizen of Canada who has been a resident of the United States since 1954, presently residing in Monroe County, New York, and that her six minor children, plaintiffs on behalf of whom she also sues, are aged 14, 13, 12, 11, 9 and 1, and are citizens of the United States by birth; that the United States Immigration and Naturalization Service has classified plaintiff Holley "as a deportable alien" but has determined "not to deport her, for humanitarian reasons, so long as her citizen children remain dependent upon her"; that application to the Immigration and Naturalization Service for status as an immigrant alien was

* The fourth cause of action, in alleging the deprivation of rights secured by the laws of the United States draws its vitality from the first and second causes of action (the pendent claims). Since the first and second causes of action are without merit, the fourth cause of action is also without merit.

** The County Commissioner also cross-moved for summary judgment (89).

denied because as a person receiving public assistance she is ineligible for immigrant status; and that since 1968, plaintiff Holley has been the recipient of AFDC on behalf of her children. The complaint further alleges the enactment of New York Social Services Law § 131-k, effective June 7, 1974; the promulgation of Departmental Regulation 18 NYCRR § 349.3; action on the part of the County Commissioner on August 20, 1974 to reduce the public assistance grant for the seven plaintiffs by the amount allocated to meet the needs of plaintiff Holley because her "alien status made her ineligible for public assistance", resulting in a loss of $50.33 per month to the "McQuoid family household"; the request for a departmental administrative fair hearing and the affirmance of the County Commissioner's action by the State Commissioner; and the marriage of plaintiff Holley on February 25, 1975 to Wayne Holley, recipient of a "separate public assistance grant" for which eligibility is based on disability.

The complaint alleges four causes of action:

First (8): That New York Social Services Law § 131-k, as enacted and applied, is invalid in that it is "inconsistent with, and operates to defeat the purposes of, the Social Security Act". Here plaintiffs rely on 42 U.S.C. §§ 601, 602(a)(10) and 606(b)(1);

Second (9): That section 131-k, as enacted and applied, is invalid in that it is inconsistent with Federal regulatory authority (45 C.F.R. § 233.50) in that plaintiff Holley "is permanently residing in the United States under color of law" within the provisions of such regulation;

Third (10): The third cause of action alleges plaintiffs' constitutional claim; and

Fourth (11): That plaintiffs are being denied rights secured by the Civil Rights Act of 1871 (42 U.S.C. § 1983).

The complaint requests, inter alia (12):

(a) A declaration that New York Social Services Law § 131-k, as enacted and applied, "is invalid in that it is inconsistent with federal laws and regulations, and violates rights secured to the plaintiffs by the Constitution and laws of the United States."

(b) A "temporary restraining order, preliminary injunction, and permanent injunction restraining defendants from enforcement of" New York Social Services Law § 131-k.

(c) The convening of a Three-Judge Court pursuant to 28 U.S.C. § 2281, et seq.

State Commissioner's Answer (17)

The State Commissioner's answer does not deny the material factual allegations of the complaint.

The first affirmative defense alleges that "The complaint fails to state a claim upon which relief can be granted for the reason that plaintiff, Gayle McQuoid Holley, is an alien illegally present in the United States (as shown by Exhibit "A" in her complaint herein), and that consequently she has no standing to demand, or qualification for, and no entitlement to benefits for herself under the Social Security Laws of the United States."* The second affirmative defense alleges lack of subject matter jurisdiction.

The fifth affirmative defense is a general allegation that the complaint fails to state a claim upon which relief can be granted.

The sixth affirmative defense alleges that New York State Social Services Law § 131-k is valid and constitutional.**

* Thus alleging the State Commissioner's motion to dismiss.

** The third affirmative defense alleged is that the Court lacks jurisdiction, by reason of the Eleventh Amendment to the Constitution of the United States, to award damages as prayed for in the complaint against defendant. (See Edelman v. Jordan [415 U.S. 651 (1973)]). The fourth affirmative defense alleged is that the Court lacks jurisdiction, by reason of the Eleventh Amendment to the Constitution of the United States, to award attorneys' fees for plaintiffs' attorneys against defendant as prayed for in the complaint. (See Stanton v. Bond [528 F. 2d 688 (7th Cir., 1976)], cert. granted ___U.S.___, 44 U.S.L.W. 3685 [June 1, 1976]). Since plaintiffs have not briefed these issues we have not briefed them. We respectfully reserve the right to do so at an appropriate time.

State Commissioner's Cross Motion for Summary Judgment (38)

This has been discussed, supra.

The affidavit of Eleanor A. Sochocki, a Principal Social Services Program Specialist, Division of Income Maintenance, New York State Department of Social Services, was filed in support of the State Commissioner's cross motion for summary judgment, and in opposition to plaintiffs' motion (41).

Decision and Order Below (94)

Judge BURKE held (95, 96):

> "Plaintiffs' motion for summary judgment and for a three judge court is in all respects denied.
>
> "Summary judgment is granted in favor of the defendant State Commissioner of Social Services against the plaintiffs declaring that New York Social Services Law Section 131-k and departmental regulation 18 NYCRR, Section 349.3, as enacted and applied, do not conflict with the provisions of 45 C.F.R. Section 233.50 but are in conformity thereto; that the statute and the regulation as enacted and applied do not conflict with the Social Services [sic] Act but are in conformity thereto; that plaintiffs have not been deprived of rights secured by the laws of the United States; that plaintiff Gayle McQuoid Holley is not permanently residing in the United States under color of law."

The Illegal Alien Problem

For an exposition of "the illegal alien problem" in the United States, see United States v. Ortiz (422 U.S. 891 [1975], concurring opinion of the Chief Justice at page 899). See also United States v. Baca (368 F. supp. 398 [D.C.S.D., Ca., 1973]). In the latter case, an exposition of "the illegal alien problem" appears at 368 F. Supp. 402 which is the same as was set out by the Chief Justice in his concurring opinion in Ortiz. The exposition recites in part:

> "In some states illegal aliens abuse public assistance programs. In some instances entire families who entered the country illegally have been admitted to the welfare rolls. Aliens in California at 35, 43".

See 368 F. Supp. at 403 and 422 U.S. at 904.

There are "as many as" 12 million illegal aliens now present in the country (422 U.S. at 899). The potential for abuse of the welfare system would appear to be real.

A Report to the Congress by the Comptroller General of the United States entitled "More Needs to be Done to Reduce the Number and Adverse Impact of Illegal Aliens In The United States," dated July 31, 1973, stated (p. 41):

> "No estimates of the number of illegal aliens on welfare are available. INS occasionally apprehends aliens who have been receiving welfare payments or other benefits, and some State agencies and commissions have concluded that illegal aliens cause a drain on welfare programs. Examples of illegal aliens receiving welfare in several States show that the problem is widespread."

The Memorandum of the State Department of Social Services in support of the bill adding New York Social Services Law § 131-k (Exh. B, Sochocki affidavit [55]) stated:

> "Budget implications: A 1971 Aid to Families with Dependent Children Characteristic Study indicates that there are as many as 25,000 illegal aliens now in New York State's public assistance rolls in the category of Aid to Dependent Children, receiving benefits totalling $25 million annually and consuming Medicaid services up to $15 million annually. On the basis of this study, the total savings to the State and local districts on their share of such payments could be as much as $20 million annually, or one-half the total expenditure for this group. Failure to enact the bill will subject the State to loss of the 50% federal reimbursement on ADC and MA benefits paid to illegal aliens--also $20 million annually."

Admittedly, these figures are estimates. Furthermore, the public assistance cost of $25 million included illegal aliens receiving state-financed public assistance in the category of Home Relief as well as AFDC. Under any view, however, illegal aliens receiving welfare do constitute a drain upon finite State funds which are available for the cost of public assistance.

After the promulgation of the Federal regulation relating to "Citizenship and Alienage" (45 C.F.R. § 233.50) to be effective January 2, 1974 (Sochocki affidavit, Exh. A)(see Point I, infra), New York amended its statutes and regulations to comply (Sochocki affidavit, par. 5 [43], also Departmental memorandum, Exh. B, supra [55]).

The State statute (Social Services Law § 131-k) and Departmental regulation (18 NYCRR § 349.3) do not define who is an illegal alien, in recognition of the fact that it is not for the State of New York to do so but rather for the United States Immigration and Naturalization Service. In the case at bar, the INS has found that plaintiff Holley is illegally in the United States (Exh. A, annexed to complaint [13]). Thus, under Federal requirements, followed by New York, she is ineligible for AFDC.

The Supreme Court of the United States decided Mathews v. Diaz (___U.S.___, 96 S.Ct. 1883, 44 U.S.L.W. 4748) on June 1, 1976. The case dealt with the Federal Medicare residency requirements (42 U.S.C. § 1395-o) and upheld them. As will appear, it is particularly pertinent to the case at bar.

Statute of the United States Involved
42 U.S.C. § 602(b)

"(b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth."

Regulation of the Federal Secretary of
Health, Education and Welfare Involved

45 C.F.R. § 233.50

"§ 233.50 Citizenship and alienage.

Conditions for plan approval. A State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act shall include an otherwise eligible individual who is a resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a)(7)* or section 212(d)(5)* of the Immigration and Nationality Act). [38 FR 30259, Nov. 2. 1973]"

* 42 U.S.C. § 1153(a)(7) [conditional entry] and 42 U.S.C. § 1182(d)(5) [parole], respectively.

Statute of the State of New York Involved

New York Social Services Law, § 131-k

"§ 131-k. Illegal aliens

"1. Any inconsistent provisions of this chapter or other law notwithstanding, an alien who is unlawfully residing in the United States or who fails to furnish evidence that he is lawfully residing in the United States shall not be eligible for aid to dependent children, home relief or medical assistance, except for a temporary period of thirty days in accordance with subdivision two of this section.

"2. An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or medical assistance because he is an alien unlawfully residing in the United States or because he failed to furnish evidence that he is lawfully residing in the United States shall, nevertheless, be eligible to receive home relief and medical assistance for a temporary period not to exceed thirty days from the date of such determination in order to allow time for the referral of the cases to the United States immigration and naturalization service, or nearest the consulate of the country of the applicant or the recipient, and for such service or consulate to take appropriate action or furnish assistance." (Added L. 1974, c. 811, § 1, effective June 7, 1974.)

Regulation of the New York State Department Of Social Services Involved

18 NYCRR § 349.3

"349.3 Illegal aliens

"(a) Any inconsistent provisions of this Title notwithstanding, an alien who is unlawfully residing in the United States, or fails to furnish evidence that he is lawfully residing in the United States as required by this section and Part 351 of this Title, is not eligible for aid to dependent children, home relief or medical assistance, except for a temporary period of 30 days in accordance with subdivision (b) of this section.

"(b) An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or medical assistance because he is an alien unlawfully residing in the United States, or because he failed to furnish evidence that he is lawfully residing in the United States as required by this section and Part 351 of this Title, shall, nonetheless, be eligible to receive home relief and medical assistance for a temporary period not to exceed 30 days from the date of such determination in order to allow time for the referral of the case to the United States Immigration and Naturalization Service, or the nearest consulate of the country of the applicant or recipient, and for such service or consulate to take appropriate action or furnish assistance." (Added May 2, 1974, effective April 1, 1974.)

ARGUMENT

POINT I

THERE IS NO CONFLICT BETWEEN NEW YORK SOCIAL SERVICES LAW, § 131-k AND FEDERAL REGULATIONS. PLAINTIFFS' SECOND CAUSE OF ACTION IS WITHOUT MERIT AS MATTER OF LAW.

Plaintiffs' second cause of action is grounded upon an alleged conflict between New York Social Services Law, § 131-k as enacted and applied and 45 C.F.R. § 233.50, the HEW regulation pertaining to "Citizenship and alienage" in AFDC.

Plaintiff Holley alleges (Complaint, par. 32 [10]) that she is "permanently residing in the United States under color of law" and, therefore, satisfies the requirements of 45 C.F.R. § 233.50. Her position is untenable because (a) the INS does not consider her to be permanently residing here, and (b) the background of the HEW regulation demonstrates that the phrase "permanently residing under color of law" was intended to have a specific application which does not include plaintiff's case. The Federal regulation and section 131-k were properly applied in this case.

A. The INS Position

Plaintiff Holley's problem arises out of the fact that under the Federal regulation she is neither "an alien lawfully admitted for permanent residence" or an alien "otherwise permanently residing in the United States under color of law" (emphasis supplied).

The Immigration and Naturalization Service has stated that plaintiff Holley "is illegally in the United States" and that "this service does not contemplate enforcing her departure from the United States at this time. Should the dependence of the children change, her case would be reviewed for possible action consistent with the circumstances then existing" (Exhibit A, annexed to the Complaint [13]).* Thus, plaintiff Holley is not permanently in the United States under color of law as far as the INS is concerned but is an illegal alien. Nor is her presence here sufficient to satisfy the requirements of the HEW regulation.

B. Background of the HEW regulation and its meaning

After the decision of the Supreme Court of the United States in Graham v. Richardson (403 U.S. 365 [1971]), invalidating state welfare durational residence requirements as to aliens lawfully in this country, the Federal Secretary of Health, Education and Welfare issued proposed regulations to "implement" the decision.

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* See 8 U.S.C. § 1101(a)(31), which provides:

"§ 1101. Definitions
(a) As used in this chapter --

* * *

(31) The term 'permanent' means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law."

These appeared in 37 Federal Register, p. 11977 (Friday, June 16, 1972). The proposed section 233.50 relating to citizenship and alienage in the AFDC and other programs would have read as follows:

> "§ 233.50 Citizenship and Alienage.
>
> "Condition for plan approval: A State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act may not exclude an otherwise eligible individual on the basis that he is not a citizen, or because of his alien status."

On June 27, 1973, the Secretary published a revised proposed section 233.50 in the form as finally promulgated (38 Federal Register, p. 16911). That publication indicates that comments were received from 59 persons, 50 of whom were opposed to granting of assistance to aliens who have not been lawfully admitted to this country; that the comments were based primarily on (1) the belief that the Supreme Court decision in Graham v. Richardson, and the equal protection clause of the Constitution are not applicable to aliens not lawfully admitted to the United States; (2) the fear that "this policy" would raise case loads beyond a State's fiscal capabilities or require a corresponding reduction of assistance to citizens and lawfully admitted aliens, and (3) the belief that assistance to such aliens, if provided at all, should be fully financed from Federal funds, since the Federal Government has responsibility for immigration and naturalization. The publication also states "[r]ecent congressional action, e.g., the exclusion of 'illegal' aliens from the Supplemental Security Income program, coincides with the public response."

On Friday, November 2, 1973, the Secretary of Health, Education and Welfare promulgated the revised section 233.50 (38 Federal Register, p. 30259). The preamble to the regulation stated that the previous proposal published on June 16, 1972 "was interpreted as requiring inclusion of aliens not legally in this country" and that:

> "Requiring inclusion of illegal aliens, or leaving the matter to State option would be inconsistent with title III of Pub. L. 92-603, which establishes a Federal program of Supplemental Security Income for the Aged, Blind, and Disabled (SSI) that excludes aliens not lawfully residing in this country. Accordingly, the regulations as proposed on June 27, 1973, are hereby adopted." (Emphasis supplied.)*

The SSI provision referred to is virtually identical to the HEW regulation. 42 U.S.C. § 1382-c(a)(1)(B) provides:

> "(a)(1) For purposes of this subchapter, the term 'aged, blind, or disabled individual' means an individual who --
>
> * * *
>
> "(B) is a resident of the United States, and is either (i) a citizen or (ii) an alien lawfully admitted for permanent residence or

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* It is often held that the HEW construction of the Social Security Act "is entitled to great weight and will be shown great deference" (Owens v. Roberts, 377 F. Supp. 45 at 57 [D.C., Fla., 1974], vac. on other grounds, 377 F. Supp. at 59). Also FTC v. Mandel Bros. (359 U.S. 385 [1959]); Udall v. Tallman (380 U.S. 1 [1965]); Leary v. United States (395 U.S. 6, 25 [1969]); Townsend v. Swank (404 U.S. 282, 286 [1971]); Great Northern Ry. v. United States (315 U.S. 262 [1942]); Red Lion Broadcasting Co. v. F.C.C. (395 U.S. 367 [1969]).

> otherwise permanetly [sic] residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 1153(a)(7) or section 1182(d)(5) of Title 8)."*

We believe that the words employed in the SSI statute and in 45 C.F.R. § 233.50, are words of art and originated with the Senate Finance Committee (in relation to its deliberations

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* SSI regulations provide (20 C.F.R. § 416.204):

> "§ 416.204 Evidence of permanent residence in the United States under color of law.
>
> "(a) Type of evidence to be submitted. Evidence that an applicant has been residing permanently under color of law in the United States, as defined in § 416.120 for the purposes of establishing eligibility for supplemental security income payments, shall be of the following character:
>
> (1) INS Form I-94 (Arrival Departure Record) endorsed 'REFUGEE--CONDITIONAL ENTRY,' or
>
> (2) INS Form I-94 endorsed to show bearer has been paroled for an indefinite period pursuant to section 212(d)(5) of the Immigration and Nationality Act, or
>
> (3) Documentation in the form of correspondence from the Immigration and Naturalization Service stating the applicant has been granted indefinite voluntary departure or an indefinite stay of deportation.
>
> (b) Evidence not available. If the evidence described in paragraph (a) of this section is not available, the applicant shall state the reason therefor and submit other evidence of probative value."

We have been unable to find any such regulation pertaining to AFDC. In any event, it appears that, in the case at bar, there is no stay of deportation but that the INS has merely concluded that "immediate deportation is not practicable or proper" (8 U.S.C. § 1227[a]). See Exhibit A annexed to the complaint. Stays of deportation are covered by 8 U.S.C. § 1227(d) which has no application here.

on H.R. 1 of 1972) as a proposed Amendment of the AFDC provisions of the Social Security Act.* Attached hereto as Appendix "A" is that portion of Senate Report No. 92-1230 relating to "Eligibility of Aliens for Welfare; Persons outside the United States" which commences at page 465. It states in pertinent part (p. 466):

> "* * * States would be mandated in Federal law to require as a condition of eligibility for the AFDC welfare program under the Social Security Act * * * that an individual be a resident of the United States and either a citizen or alien lawfully admitted for permanent residence or a person who is a permanent resident under color of law (that is, a person who entered the United States before July 1948 and who

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* H.R. 1 as passed by the House proposed fundamental change in all categorical assistance programs. It would have replaced the categories granting assistance to states for aid to needy persons (Old Age Assistance [Title I], Aid to the Blind [Title X], Aid to the Permanently and Totally Disabled [Title XIV], Aid to the Aged, Blind and Disabled [Title XVI] and Aid to Families with Dependent Children [Title IV]) with two basic programs both oriented toward Federal administration rather than State administration. These were the "Family Assistance Program" (Proposed Title XXI) and "Assistance for the Aged, Blind and Disabled" (proposed Title XX). (House Report No. 92-231, 1972 U.S. Code Congressional and Administrative News, p. 4989, et seq.) The Senate Finance Committee rejected the Family Assistance Program and revised the program of Adult assistance (Senate Report No. 92-1230). The result was that the Congress was unable to agree on changes in the AFDC program and none were made (see, 1972 Congressional Quarterly Almanac p. 909). "All efforts to amend AFDC were postponed for another session of Congress." (See Burns v. Alcala [420 U.S. 575 at 585 (1974)]).

may be eligible for admission for permanent residence at the discretion of the Attorney General under section 1259 of title 8 of the United States Code)." (Emphasis supplied.)*

The AFDC eligibility provisions proposed by the Senate Finance Committee incorporated the proposal (Social Security Act, proposed section 411[ ][2]). While the AFDC provisions

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* 8 U.S.C. § 1259 provides:

> "§ 1259. Record of admission for permanent residence in the case of certain aliens who entered the United States prior to June 30, 1948
>
> "A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of this application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 1182(a) of this title insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he--
>
> (a) entered the United States prior to June 30, 1948;
> (b) has had his residence in the United States continuously since such entry;
> (c) is a person of good moral character; and
> (d) is not ineligible to citizenship."

were not enacted, the proposal was enacted as to the SSI program (42 U.S.C. § 1382(c)(a)(1) (B),* supra), apparently as a substitute for the House provision (see Appendix "A").

Since 8 U.S.C. § 1259 has no application to the case at bar, and in view of the explicit statement of congressional intent, plaintiff Holley is not "permanently residing in the United States under color of law" within 45 C.F.R. § 233.50. As a matter of law, there is no merit to plaintiff's second cause of action. New York Social Services Law, § 131-k, as applied does not conflict with the Federal regulation.

Rather, section 131-k, as enacted, is required by Federal regulation. As the HEW Federal Register release of November 2, 1973 (38 Federal Register, p. 30259, supra) states, the exclusion of illegal aliens from AFDC was not to be a matter of "state option".

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* Section 1382-c(a)(1)(B) and 45 C.F.R. § 233.50 also provide that parolees (8 U.S.C. § 1182[d][5]) and those granted conditional entry visas (id. § 1153[a][7]) are specifically covered under SSI and AFDC respectively. Plaintiff Holley is neither. She is an illegal alien.

POINT II

ILLEGAL ALIENS ARE EXCLUDABLE FROM AFDC AS A MATTER OF FEDERAL LAW; NEW YORK SOCIAL SERVICES LAW § 131-k DOES NOT CONFLICT WITH THE PROVISIONS OF THE SOCIAL SECURITY ACT BUT IS AGREEABLE TO THEM AND IS REQUIRED BY 45 C.F.R. § 233.50; PLAINTIFFS' FIRST CAUSE OF ACTION GROUNDED UPON AN ALLEGED CONFLICT BETWEEN THE STATE STATUTE AND THE SOCIAL SECURITY ACT IS WITHOUT MERIT AS MATTER OF LAW.

We submit that to ask the question whether the Congress intended to provide illegal aliens with welfare benefits provided to citizens and to lawfully admitted aliens is to answer it. Indeed the Supreme Court has answered the question:

> "Since it is obvious that Congress has no constitutional duty to provide all aliens [emphasis by the Court] with the welfare benefits provided to citizens, the party challenging the constitutionality of the particular line Congress has drawn has the burden of advancing principled reasoning that will at once invalidate that line and yet tolerate a different line separating some aliens from others. In this case the appellees have challenged two requirements, first that the alien be admitted as a permanent resident, and second that his residence be of a duration of at least five years. But if these requirements were eliminated, surely Congress would at least require that the alien's entry be lawful; * * *" (emphasis supplied).

Mathews v. Diaz, supra (44 U.S.L.W. 4748 at 4753).

With the Supreme Court's holding in mind, we turn to plaintiffs' first cause of action which is grounded upon an

alleged conflict between section 131-k and the provisions of the Social Security Act.

It is inapposite to argue, as plaintiffs do, from those AFDC sections of the Social Security Act, and cases dealing with them, which are general in their application. The nub of the case lies in the meaning of 42 U.S.C. § 602(b), supra, and similar provisions relating to other Federal-State categories of public assistance and in the fact that the regulation of the Secretary of Health, Education and Welfare has required New York to exclude illegal aliens from coverage under the AFDC program.*

The Social Security Act of 1935 included among its provisions Titles I (Old Age Assistance [OAA]), IV (Aid to Dependent Children) and X (Aid to the Blind [AB]).

The Old Age Assistance and Aid to the Blind programs, like AFDC, provided for the submission and approval of State plans (42 U.S.C. §§ 302[a], 602[a], 1202[a]). Section 302 (b) (OAA) provides:

> "(b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes, as a condition of eligibility for assistance under the plan --
>
> (1) an age requirement of more than sixty-five years; or

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* HEW has approved the State regulation (18 NYCRR § 349.3) which provides that illegal aliens are not eligible for AFDC, thus indicating that it conforms with Federal law (Sochocki affidavit, par. 5).

(2) any residence requirement which (A) in the case of applicants for old-age assistance, excludes any resident of the State who has resided therein five years during the nine years immediately preceding the application for old-age assistance and has resided therein continuously for one year immediately preceding the application, and (B) in the case of applicants for medical assistance for the aged, excludes any individual who resides in the State; or

(3) any citizenship requirement which excludes any citizen of the United States.

* * *"

Senate Report No. 628 of 1935, as to OAA (§ 302[b]) stated (p. 29):

"(b) Liberality of certain eligibility requirements:

(1) * * *
(2) * * * (No State is required to give assistance to nonresidents of the State.)

(3): A person shall not be denied assistance on the ground that he has not been a United States citizen for a number of years, if in fact, when he receives assistance, he is a United States citizen. This means that a State may, if it wishes, assist only those who are citizens, but must not insist on their having been born citizens or on their having been naturalized citizens for a specified period of time.

The limitations of subsection (b) do not prevent the State from imposing other eligibility requirements (as to means, moral character, etc.) if they wish to do so. Nor do the limitations of subsection (b) mean that the states must adopt eligibility requirements just as strict as those enumerated. The States can be more lenient on all these points, if they wish to be so."

The provisions of House Report No. 615 of 1935 were the same (p. 18).

Aid to the Blind was not provided in the House bill and was not dealt with in the House Report. The Senate Report, as to section 1202(b), stated (p. 52):

> "(b) The liberality of the eligibility requirements, which a State plan must contain, are worded in a similar fashion to paragraphs (2) and (3) of section 2 (b). These relate to residence and citizenship. In the State plan for aid to the blind no limitation is placed upon any age requirement which the State may impose."

As to the AFDC provisions of 42 U.S.C. § 602(b), supra, Senate Report No. 628 (pp. 35, 36) stated:

> "(b) Liberality of residence requirement: No residence requirement shall be imposed which results in the denial of aid with respect to an otherwise eligible child, if the child was born in the State within the year, or has resided in the State for at least a year immediately preceding the application for aid; and the House bill has been changed so that, in the case of a child born within the State during the year, a State could deny aid unless the child's mother had lived in the State for a year prior to the child's birth. The State may be more lenient than this, if it wishes. It may, furthermore, impose such other eligibility requirements--as to means, moral character, etc.--as it sees fit. No State is required to give aid to nonresidents."

The provisions of House Report No. 615 of 1935 were the same except as to the noted Senate amendment (p. 24).

In 1950 the Congress extended the Social Security Act to cover Aid to the Permanently and Totally Disabled (Title XIV) (64 Stat. 555). The provisions of 42 U.S.C. § 1352(b), as to residency and citizenship were identical to those regarding AB.

In 1962 a new Title XVI was inserted in the Social Security Act to permit the States to combine their programs of Aid to the Aged, Blind and Disabled (AABD) (76 Stat. 197). The provisions of 42 U.S.C. § 1382(b) generally follow those of Titles I, X and XIV as to age, residence and citizenship provisions of a State plan to provide such assistance* (see Graham v. Richardson, [403 U.S. 395 at 380, et seq. (1970)]).

42 U.S.C. § 602(b) as to AFDC, did not require the Secretary to disapprove a State citizenship requirement as did the provisions relating to the adult categories of assistance. Thus the States could require that recipients of AFDC be citizens of the United States and could exclude non-citizens. ** This was

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* Titles I, X, XIV and XVI were repealed as to the fifty states by Public Law 92-603, section 303, effective January 1, 1974. Those categories are now covered by the Federal Supplemental Security Income (SSI) program.

** As to the Medicaid Program, enacted in 1965 (Title XIX), the Secretary of Health, Education and Welfare was directed not to approve a State plan containing a citizenship requirement which excludes any citizen of the United States. (42 U.S.C. § 1396-a[b]). AFDC recipients are automatically included in Medicaid (see § 1396-a[13][B]). It was in 1965 that the Congress contemporaneously enacted the Federal Medicare Program (Title XVIII) and required that aliens be lawfully admitted for five years to qualify (42 U.S.C. § 1395-o). That provision was upheld in Mathews v. Diaz, supra and, we urge, clearly demonstrates that illegal aliens are not to participate in federally-financed welfare programs. Accord, 42 U.S.C. § 1382-c(a)(1)(B), supra.

recognized by the Senate Finance Committee in its deliberations concerning H.R. 1 of 1972. The Report of that Committee as to H.R. 1 (No. 92-1230) stated (pp. 465, 466):

> "Present law.-- Under the Social Security Act, the Secretary of Health, Education, and Welfare may not approve a State plan of aid to the aged, blind, or disabled which imposes as a condition of eligibility for welfare 'any citizenship requirement which excludes any citizen of the United States' (sections 2(b)(3), 1002(b)(2), 1402(b)(2), and 1602(b)(3)). There is no similar clause in the Federal title relating to Aid to Families with Dependent Children. Thus all the welfare titles of the Social Security Act would permit a State to exclude noncitizens from welfare benefits, although the law does not say so explicitly." (Emphasis supplied.) (Appendix A.)

It was only because the Supreme Court had invalidated state durational residency requirements as to lawfully admitted aliens in Graham v. Richardson, supra, on constitutional grounds* that it was proposed to amend the AFDC provisions to explicitly exclude illegal aliens from coverage.

On this motion for summary judgment as to plaintiffs' first cause of action, the only question presented is does New York Social Services Law § 131-k conflict with the AFDC provisions of the Social Security Act.

Clearly, as a matter of Federal law and congressional intent, non-citizens, and specifically non-citizen illegal aliens, were

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* See also Shapiro v. Thompson (394 U.S. 618 [1969]) invalidating state AFDC durational residency requirements as to citizens - also on constitutional grounds.

and are excludable from assistance under any of the categorical assistance programs.*

Since illegal aliens are excludable as a matter of Federal law and since the State law in question merely follows Federal law, there is no conflict between State and Federal law (Burns v. Alcala [420 U.S. 575 at 578 (1974)], New York State Dept. of Social Services v. Dublino [413 U.S. 405 (1975)], DiCanas v. Bica [424 U.S. 351 (1975)], Doe v. Mahar [414 F. Supp. 1368 (D. C. Conn., three-judge Court [1976])]), and plaintiffs' first cause of action lacks merit as matter of law (Mathews v. Diaz, supra).

CONCLUSION

THE ORDER AND JUDGMENT APPEALED FROM SHOULD BE AFFIRMED. A THREE-JUDGE COURT SHOULD, HOWEVER, BE CONVENED.

Dated: January 3, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee State
Commissioner of Social Services

JEAN M. COON
Assistant Solicitor General

ALAN W. RUBENSTEIN
Principal Attorney

of Counsel

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* See also Public Law 92-603, § 137.

Calendar No. 1175

92d Congress, 2d Session - - - - - - Senate Report No. 92-1230

SOCIAL SECURITY AMENDMENTS OF 1972

REPORT

OF THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

TO ACCOMPANY

H.R. 1

TO AMEND THE SOCIAL SECURITY ACT, AND FOR OTHER PURPOSES

(Together With Additional Views)

COMMITTEE ON FINANCE
UNITED STATES SENATE
RUSSELL B. LONG, *Chairman*

SEPTEMBER 26 (legislative day, SEPTEMBER 25), 1972

Printed for the use of the Committee on Finance

U.S. GOVERNMENT PRINTING OFFICE
78-178 O WASHINGTON : 1972

APPENDIX "A"

ELIGIBILITY OF ALIENS FOR WELFARE; PERSONS OUTSIDE THE UNITED STATES

Present law.—Under the Social Security Act, the Secretary of Health, Education, and Welfare may not approve a State plan of aid

to the aged, blind, or disabled which imposes as a condition of eligibility for welfare "any citizenship requirement which excludes any citizen of the United States" (sections 2(b)(3), 1002(b)(2), 1402(b)(2), and 1602(b)(3)). There is no similar clause in the Federal title relating to Aid to Families with Dependent Children. Thus all the welfare titles of the Social Security Act would permit a State to exclude noncitizens from welfare benefits, although the law does not say so explicitly.

House bill.—For the new program of Federal aid to the aged, blind, and disabled, H.R. 1 as it passed the House would limit eligibility to an individual who "is a resident of the United States, and is either (i) a citizen or (ii) an alien lawfully admitted for permanent residence" (section 2014(a)(1)(B)). There is a similar provision under the Family Assistance Program in the House-passed bill.

The House bill also (secs. 2011(f) and 2155(a)(4)(B)) makes an individual ineligible for welfare payments during any month in which the person is outside the United States the entire month; once an individual has been outside the United States at least 30 consecutive days, he must remain in the United States 30 consecutive days before he may again be eligible for welfare.

Court cases.—The Supreme Court on June 14, 1971 (*Graham v. Richardson*) ruled that a State could not condition welfare benefits either upon the applicant being a U.S. citizen or, if an alien, on his having resided in the United States for a specified number of years. Such eligibility requirements were held to violate the Equal Protection Clause of the 14th amendment. As far as the explicit provisions of the Social Security Act were concerned, the Court concluded that they did not affirmatively authorize, much less command, the States to adopt duration of residency requirements or other eligibility restrictions applicable to aliens, but instead merely directed the Secretary not to approve a State plan which excluded U.S. citizens from eligibility. Although the Federal Government admittedly had broad constitutional power to determine what aliens should be admitted to the United States, the period they could remain, and the terms and conditions of their naturalization, the Court felt that the Congress nevertheless did not have the power to authorize the individual States to violate the Equal Protection Clause.

Committee provision.—Under the committee bill this matter would be handled in the same manner as the issue of duration of residency requirements. That is, States would be mandated in Federal law to require as a condition of eligibility for the AFDC welfare program under the Social Security Act (in addition to the 3-month duration of residence requirement) that an individual be a resident of the United States and either a citizen or alien lawfully admitted for permanent residence or a person who is a permanent resident under color of law (that is, a person who entered the United States before July 1948 and who may be eligible for admission for permanent residence at the discretion of the Attorney General under section 1259 of title 8 of the United States Code).

The committee bill also incorporates the provision of the House bill making an individual ineligible for welfare payments if he has been outside the United States at least 30 consecutive days but has not yet been back in the United States for 30 consecutive days.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

Gayle McQuoid Holley, et al. vs. Abe Lavine, et al.

Colleen Acker, being duly sworn, says:

I am over eighteen years of age and a Stenographer in the office of the Attorney General of the State of New York, attorney for the ~~XXXXXXXXXX~~Appellee (Lavine) herein.

On the 5th day of January 1977 I served the annexed Brief for Appellee (Lavine) upon the attorney___ named below, by depositing two copies thereof, properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said attorney___ at the address ___ within the State respectively theretofore designated by him for that purpose as follows:

K. Wade Eaton, Esq.
Greater Up-State Law Project
80 West Main Street
Rochester New York 14614

Colleen Acker

Sworn to before me this
5th day of January 5, 1977

Ralph D. Camardo

RALPH D. CAMARDO
Notary Public, State of New York
No. 4618149
Qualified in Albany County
Commission Expires March 30, 1977